

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

TRACY RHINE,

Plaintiff,

v.

**CIVIL ACTION NO. 3:13-CV-21
(JUDGE GROH)**

UNITED STATES OF AMERICA,

Defendant.

ORDER ADOPTING OPINION/REPORT AND RECOMMENDATION

On this day, the above-styled matter came before the Court for consideration of the Report and Recommendation of United States Magistrate Judge John S. Kaull. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Kaull for submission of a proposed report and a recommendation ("R & R"). Magistrate Judge Kaull filed his R & R on April 4, 2013 [Doc. 10]. In that filing, the magistrate judge recommended that this Court deny Plaintiff's Motion for Leave to Proceed *in forma pauperis* and dismiss without prejudice Plaintiff's Complaint pursuant to 28 U.S.C. § 1915(g).

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150, 160 S. Ct. 466 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the petitioner's or plaintiff's right to appeal this Court's Order. **28**

U.S.C. § 636(b)(1); *Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91, 94 (4th Cir. 1984). Objections to Magistrate Judge Kaull's R & R were due within fourteen (14) days of being served with a copy of the same, pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b). The docket reflects that service was accepted on April 8, 2013. [Doc. 11]. Neither party filed objections to the R & R. Accordingly, this Court will review the report and recommendation for clear error.

Plaintiff initiated this action while in the custody of the Bureau of Prisons. The magistrate judge found that Plaintiff had at least three non-habeas civil actions or appeals previously dismissed as frivolous or for failing to state a claim upon which relief may be granted. Pursuant to 28 U.S.C. § 1915(g),

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Thus, based on the strikes Plaintiff has accumulated, she may not file another complaint without prepayment of fees unless she is in "imminent danger of serious physical injury." Plaintiff sought monetary damages from the United States based on the alleged negligence of SFF Hazleton staff in protecting her from a physical attack from another inmate. The magistrate judge found that Plaintiff was not in imminent danger of serious physical injury because the other inmate is no longer in the custody of the Bureau of Prisons having escaped while in transit to a halfway house.


Upon careful review of the report and recommendation, it is the opinion of this Court

that the magistrate judge's **Report and Recommendation [Doc. 10]** should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. Accordingly, the Court hereby **DENIES** Plaintiff's Motion for Leave to Proceed *in forma pauperis* **[Doc. 8]**, and **DISMISSES WITHOUT PREJUDICE** Plaintiff's Complaint **[Doc. 1]**. Accordingly, this matter is hereby **ORDERED STRICKEN** from the active docket of this Court. The Clerk is **DIRECTED** to enter judgment for Defendant

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record and to mail a true copy by certified mail, return receipt requested, to the *pro se* Plaintiff.

DATED: April 24, 2013


GINA M. GROH
UNITED STATES DISTRICT JUDGE